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No. 83-391

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

CALIFORNIA GLAZED PRODUCTS, INC.,
a California corporation,
Petitioner,

vs.

THE BURNS AND RUSSELL COMPANY OF BALTIMORE CITY,
a Maryland corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

LAWRENCE ALIOTO
111 Sutter Street
San Francisco, CA 94104
Telephone: (415) 434-2100
Attorney for Petitioner

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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This brief is in reply to the respondent's brief opposing the petition for writ of certiorari.

I

This case is a very simple one which will not require a great deal of this Court's time, even if certiorari is granted.

Respondent argues that the petition invites this Court to descend into an evidentiary morass in a case which is important only to the parties. Respondent is wrong on both counts.

The issue here is whether there was substantial evidence to support the jury's implied finding of separate products. That evidence is stated in the petition for certiorari at pages 7 to 12. Citations to the record are provided. Certainly it will not unduly burden this Court to cause the evidentiary record to be transmitted to it and to verify that indeed the record does contain substantial evidence precluding judgment n.o.v. Armed with the present petition and with the reporter's trial transcript and the exhibits in this case, a very short time will be required for this Court to determine whether j.n.o.v. was proper, or whether the Ninth Circuit unlawfully took petitioner's judgment away.

Should this Court determine that the jury's implied finding on separate products was supported by substantial evidence, the petition for certiorari should be granted and the judgment of the court of appeals should be summarily reversed, and the action remanded to the court of appeals for decision of the other issues raised on appeal.

In its brief in this Court, respondent suggests that it could easily point out the evidence which compelled the result that the separate products issue had to be resolved in respondent's favor on appeal as a matter of law. Respondent refrains from doing so because there is no

such compelling evidence. There is only countervailing evidence which the jury was free to reject and did reject. Nor did the trial judge, who heard the evidence in the case, feel compelled to rule in respondent's favor on the separate products issue.

II

Reversal of the judgment of the court of appeals will be an important and salutary precedent. By upholding the jury's determination on conflicting evidence, this Court serves procedural fairness and administrative efficiency.

Everyday federal judges overstep the boundaries of the jury's domain in federal civil litigation. In the Ninth Circuit, at both the appellate and trial level, j.n.o.v. and directed verdicts are commonplace in antitrust damage actions. However, pronouncements of this Court regarding the importance of the jury in such cases are not hard to find, e.g. *Beacon Theatres v. Westover*, 359 U.S. 500 (1959); *Continental Ore v. Union Carbide*, 370 U.S. 690 (1962). These cases are no longer followed, and it is time to reaffirm the importance and place of the jury, not only in antitrust cases, but generally in civil litigation, Cf. *Alioto v. Cowles Communications, Inc.*, 519 F.2d 777 (9th Cir. 1975).

This Court does not need to hear any encomiums to the jury system. Petitioner agrees that it is the glory of the English law. 9 Wright & Miller, *Federal Practice & Procedure* § 2301. A fair-minded litigant must always respect the result of a full and fair jury trial, whether the litigant has won or lost.

But the jury is also a very important cog in the administration of justice. To the jury is committed the broad

middle ground of conflicting evidence. Decisions within this broad middle ground must be accorded finality, where the jury is correctly instructed, and there is no error in the admission or exclusion of evidence. A solid pattern of affirmance in the courts of appeal of district court judgments resting on jury verdicts would discourage appeals and encourage settlements, after trial certainly, but also before trial. The present case is far from one having no importance beyond its particular facts.

Respondent asserts that any objections to the trial court's order instructing the jury that it could not find that respondent's patent was a tying product in this case were waived when petitioner abandoned its cross-appeal in the court of appeals. The cross-appeal went to other issues in the case: whether the trial court erred in failing to submit to the jury a destruction-of-business measure of damages in addition to an overcharge measure of damages, and whether the trial court erred in refusing to relieve petitioner of an admission in the pleadings that patent royalties were owed respondent. Petitioner submits that the issue of whether the trial court should have permitted the jury to find that the patent was a tying product in this case was an issue which the court of appeals had to decide on respondent's contention on appeal that there were no separate tying and tied products in this case. That issue was properly before the court of appeals on respondent's appeal and was decided by that court. The issue was incorrectly decided by the court of appeals, because the record in this case is perfectly clear that the jury reasonably could have found that the tied products were tied to the patent license as well as to the trademark license.

CONCLUSION

Petitioner won this case fairly and honestly, and the victory should be restored to petitioner. This Court should direct the Ninth Circuit to transmit the record, should ascertain that petitioner's claims of substantial evidence are correct, and should grant the petition and summarily reverse the decision of the court of appeals, and remand for decision of the other issues on appeal. Alternatively this Court should grant the petition and set the case for argument.

October 12, 1983.

Respectfully submitted,

LAWRENCE ALIOTO
Attorney for Petitioner